

DOCKET FILE COPY ORIGINAL

RECEIVED

Before the
Federal Communications Commission
Washington, D.C. 20554

NOV 14 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matters of)	
)	
)	
Deployment of Wireline Services Offering)	CC Docket No. 98-147
Advanced Telecommunications Capability)	
)	
and)	
)	
Implementation of the Local Competition)	CC Docket No. <u>98-96</u>
Provisions of the Telecommunications)	
Act of 1996)	

REPLY COMMENTS OF SBC COMMUNICATIONS INC.

Michael K. Kellogg
Rachel E. Barkow
KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.
Sumner Square
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900

Hope Thurrott
Lori Fink
Roger K. Toppins
Paul K. Mancini
SBC COMMUNICATIONS INC.
1401 I Street, N.W., Suite 1100
Washington, D.C. 20005
(202) 326-8891

Counsel for SBC Communications Inc.

November 14, 2000

TABLE OF CONTENTS

INTRODUCTION AND SUMMARY	1
SECOND FURTHER NOTICE OF PROPOSED RULEMAKING IN CC DOCKET NO. 98-147	4
I. The Commission Must Obey the D.C. Circuit’s Mandate and Cannot Adopt a Definition of “Necessary” that Is Impermissibly Broad	4
II. The Commission Lacks Authority To Authorize Collocation of the Equipment Requested by Commenters	13
III. The Commission Lacks Authority To Order the Collocation of Cross-Connects	23
IV. The Commission Cannot Reinstate its Prior Space Assignment Regime	28
V. The Commission Cannot Require Collocation In Increments Smaller than a Rack.....	39
VI. The Commission’s Rules Regarding Remote Terminal Collocation Need Not Be Modified.....	41
VII. Changes to the Line Sharing Rules Are Unnecessary.....	44
VIII. The Proposed National Provisioning Intervals Would Be Inappropriate and Infeasible	45
A. Conditioned Space and Cageless Collocation.....	46
B. Virtual Collocation.....	47
C. Augmentation Intervals.....	48
D. Remote Terminals.....	50
IX. A National Space Reservation Policy Is Unnecessary and Inappropriate	50
FIFTH FURTHER NOTICE OF PROPOSED RULEMAKING IN CC DOCKET NO. 96-98	55
I. Commenters Have Provided No Basis for Expanding the List of UNEs or the Definition of a Loop.....	56
A. Optical Wavelength	56
B. Constant Bit Rate	58

C. Optical Concentration Devices	59
D. Line Cards.....	62
E. Broadband Loop UNEs.....	63
F. Splitters	65
II. The Commission Should Not Restrict Incumbents’ Ability To Retire Copper Loops ..	66
III. No Modification to OSS Systems Is Necessary.....	67
IV. The Commission Cannot Require ILECs To Modify Their Facilities To Allow Carriers Greater Access to the Subloop at the RT.....	70
V. An Advanced Notification Requirement for Fiber Deployment Would Be Unlawful and Would Stifle Incumbent Incentives.....	71
VI. Spectrum Compatibility Issues Should Be Deferred	72
CONCLUSION	73

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matters of)	
)	
)	
Deployment of Wireline Services Offering)	CC Docket No. 98-147
Advanced Telecommunications Capability)	
)	
and)	
)	
Implementation of the Local Competition)	CC Docket No. 98-96
Provisions of the Telecommunications)	
Act of 1996)	

REPLY COMMENTS OF SBC COMMUNICATIONS INC.

INTRODUCTION AND SUMMARY

The competitive local exchange carrier ("CLEC") commenters in these proceedings seek a wide range of onerous new regulatory requirements. Although the D.C. Circuit remanded the Commission's *Advanced Services Collocation Order*¹ for the Commission to *limit* its collocation requirements, these commenters see the *Second Further NPRM* in CC Docket No. 98-147 as an opportunity to gain expansive new access to the incumbent's property. Similarly, in the *Fifth Further NPRM* in CC Docket No. 96-98, commenters request a laundry list of new UNEs and various other requirements.

¹ First Report and Order and Further Notice of Proposed Rulemaking, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 4761 (1999) ("*Advanced Services Collocation Order*").

These commenters would have the Commission ignore both the “necessary” threshold in section 251(c)(6) and the “necessary” and “impair” hurdle of section 251(d)(2). They simply recite the subsidies they would like to receive without even attempting to ground those requests in the language or policies of the 1996 Act.

The 1996 Act, however, has both clear limits and clear goals. The D.C. Circuit held that section 251(c)(6) is limited by the “necessary” standard, and the Supreme Court held that the Commission must apply the “necessary” and “impair” test of section 251(d)(2) before declaring new network elements. The goals of the Act are equally straightforward: to allow market forces to replace regulatory fiat and to encourage the rapid deployment of advanced services.

The commenters’ requests are in tension with both the language and the goals of the Act. The advanced services market is already a competitive market and investment in new technologies is thriving. As SBC highlighted in its initial comments, there is no bottleneck in the advanced services market. And the incumbents certainly have no advantage. If anything, cable is dominating this market. Yet, despite having no advantage in this market, it is the incumbent LECs that face the harshest regulatory burdens.

The commenters in this proceeding would widen the regulatory disparity between the incumbent local exchange carriers (“ILECs”) and cable providers by having the Commission interfere in an unprecedented manner in the advanced services marketplace, without providing any evidence that it is prudent or necessary to do so. On the contrary, the interjection of additional regulation would stifle competition and slow the deployment of advanced services. Incumbent carriers would not invest in next generation technologies as rapidly or as ubiquitously if they face onerous sharing requirements regarding line cards and optical concentration devices. They would not build as many new remote terminals (“RTs”) and controlled environmental

vaults (“CEVs”) if they must split the space with their competitors with no room for the growth of incumbent equipment. They would be reluctant to deploy next generation digital loop carriers (“NGDLC”) if they must maintain copper facilities solely for their competitors’ use. In short, any new regulation in this burgeoning competitive area will create a disincentive for incumbents to invest. In turn, the gap between cable and all other forms of advanced services will widen. Thus, stringent new unbundling and collocation rules will have precisely the opposite effect these commenters claim: while they might boost the immediate standing of individual CLECs, they will hinder the development of competition and investment in advanced services generally.

Fortunately, Congress provided a check on such unbridled regulation. It enacted section 251(d)(2) to place a clear limit on the pieces of the incumbent network that must be shared. And it limited the equipment that can be collocated on an incumbent’s property to only that equipment that is necessary for access to unbundled network elements (“UNEs”) or for interconnection to the incumbent’s network. Section 706 of the 1996 Act is an additional check to prevent Commission regulation from interfering with the progress of advanced services.

These legal standards dictate the dismissal of the litany of requests raised in the comments, from the collocation of switching equipment and line cards to the unbundling of optical concentration devices, lines cards, and a “broadband loop UNE.” Commenters have offered no legal or policy grounds to replace the forces of competition with regulatory fiat in the advanced services marketplace.

**SECOND FURTHER NOTICE OF PROPOSED RULEMAKING
IN CC DOCKET NO. 98-147**

Reading the comments in the *Second Further NPRM*, it is difficult to remember that the D.C. Circuit remanded the Commission's *Advanced Services Collocation Order* for the purpose of having the Commission adopt a meaningful limiting standard and interpret "necessary" in accordance with its ordinary meaning of "required" and "indispensable." These commenters barely mention the court's opinion and see this proceeding as an opportunity not merely to reinstate all the prior collocation obligations, but also to extend those obligations. The Commission, however, is not free to ignore the D.C. Circuit's decision in *GTE Service Corp. v. FCC*, 205 F.3d 416 (D.C. Cir. 2000), nor the limited authority Congress enacted in section 251(c)(6). Because these commenters seek a collocation regime that is in direct contradiction of the 1996 Act and the D.C. Circuit's opinion, their arguments must be rejected.

I. The Commission Must Obey the D.C. Circuit's Mandate and Cannot Adopt a Definition of "Necessary" that Is Impermissibly Broad

Despite the D.C. Circuit's clear mandate that the Commission must adhere to the limitation on equipment that can be collocated in section 251(c)(6) – namely equipment that is required or indispensable to achieve access to UNEs or interconnection to the ILEC network – commenters ask the Commission to defy the court's opinion and the 1996 Act. These commenters propose various definitions of "necessary" that are as sweeping as the "used or useful" standard the D.C. Circuit flatly rejected. But just as the D.C. Circuit concluded that the Commission's prior definition found no support in the 1996 Act, so, too, must the Commission reject these requests.

For instance, Network Access Solutions would have the Commission simply reestablish the "used or useful" test, even though the D.C. Circuit held that very test impermissible.

Network Access Solutions Comments at 2-3. Other commenters ask the Commission to reinstate the “used or useful” test, but try to disguise it under another name. Telergy, Allegiance, Conectiv, and CoreComm, for instance, claim that “necessary” should be defined as “enables.” Allegiance Comments at i-ii, 50; Conectiv Comments at iii, 10; CoreComm Comments at 27; Telergy *et al.* Joint Comments at 21 (“Telergy Joint Comments”). But that is simply another way of saying “used or useful.” Indeed, CoreComm admits as much, claiming that, under the “enables” test, the Commission should allow collocation of any equipment that is *used* by the LEC itself or that *facilitates* interconnection or access to UNEs. CoreComm Comments at 12.

The Joint Commenters argue that the Commission should define “necessary” to mean the collocation of equipment that will fulfill the goals and requirements of the sections that define interconnection and access to UNEs. Arbros Communications *et al.* Joint Comments at 26, 28 (“Joint Comments”). According to the Joint Commenters, this means the Commission should require the collocation of all equipment deployed for interconnection or access to UNEs as long as it meets some threshold requirement such as the Network Equipment Building Systems (“NEBS”) Level 1 safety standards. *Id.* at 30. This, too, is a mere reiteration of the discredited “used or useful” standard; the Commission previously required the collocation of equipment deployed for access to UNEs or interconnection and the burden was on the ILEC to show that it was not being used for such a purpose.²

² The cases upon which these commenters rely to support their proposed definitions are the same cases the Commission relied upon in the D.C. Circuit to support the “used or useful” standard. For instance, Allegiance, Conectiv, the Joint Commenters, Telergy, and CoreComm place great weight on *National Railroad Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407 (1992). Allegiance Comments at 59; Conectiv Comments at 13-14; Joint Comments at 18; Telergy Joint Comments at 13; CoreComm Comments at 11. The Commission anchored its argument in the D.C. Circuit on that very case. See Brief for Respondents at 37-40, *GTE Serv. Corp. v. FCC*, Nos. 99-1176 & 99-1201 (D.C. Cir. filed Nov. 29, 1999) (“FCC Br.”); Transcript of Proceedings at 38, *GTE Serv. Corp. v. FCC*, Nos. 99-1176 & 99-1201 (D.C. Cir. Feb. 2, 2000)

@Link asks the Commission to allow the collocation of anything that provides interconnection or access to UNEs, @Link Comments at iv, which includes “any commercially available equipment . . . that has the capabilities and functions that provide interconnection or access to UNEs.” *id.* at 21-22. Once more, this is indistinguishable from the “used or useful” test. CompTel argues that any collocation practice that enables a CLEC to increase the amount of traffic exchanged between the CLEC and the ILEC (what CompTel calls “collocation throughput”) is “necessary.” CompTel Comments at 3. It demands only a correlation with interconnection. This, too, is but another incarnation of the “used or useful” standard; it is far removed from the “required” and “indispensable” language the 1996 Act demands. *GTE Serv. Corp.*, 205 F.3d at 424. NorthPoint’s “directly related” test also requires nothing more than a correlation with interconnection, because there is no requirement that the equipment be necessary, required, or indispensable. See NorthPoint Comments at 4. Focal’s proposed test is similarly deficient. Focal recommends a definition of necessary as “equipment that is used in the provision of telecommunications services, that is technically feasible to be deployed at the ILEC premises, and would facilitate CLECs’ ability to compete.” Focal Comments at 11. It is difficult to envision what equipment would fail to pass muster under this test or how this imposes the limit that “used or useful” was lacking. Intraspan would, inexplicably, have the Commission simply abdicate its responsibility to give “necessary” any meaning. Intraspan Comments at 6.

(“GTE Tr.”). Like the commenters in this proceeding, *see, e.g.*, CTSI & Waller Creek Comments at 8-9 (“CTSI Comments”); WorldCom Comments at 4, the FCC also cited *McCulloch v. Maryland*, 17 U.S. 316 (1819), for support. FCC Br. at 9, 39. And, too, the FCC attempted to make use of the definition of “necessary” in *Black’s Law Dictionary*, as some commenters do here. Compare Conectiv Comments at 14 with FCC Br. at 39. All of these sources were considered and rejected by the D.C. Circuit, which concluded that the Commission must give “necessary” its ordinary meaning of “required” or “indispensable.”

For its part, AT&T asks the Commission to make an inappropriate end-run around the limitation in “necessary” by expanding the meaning of “access” and “interconnection.” AT&T Comments at 11; *see also* CTSI Comments at 10-11. AT&T argues that “access” to an element means being able to “use” all the capabilities of the element. AT&T Comments at 12. So, for instance, under AT&T’s reading, carriers must be allowed to collocate packet switching to “make use” of the UNE loop. *Id.* at 12-13. That, too, is simply another way of saying equipment must be collocated if it is “used or useful” for access to UNEs. And that is precisely the definition the D.C. Circuit rejected in *GTE Service Corp.* as “impermissibly broad.” 205 F.3d at 424.

AT&T similarly suggests that the definition of “interconnection” allows carriers to collocate equipment that allows them to achieve interconnection of equal quality to the incumbent. AT&T Comments at 13. AT&T, like many of the commenters, appears to be of the view that section 251(c)(6) is an equal access provision that gives CLECs the right to whatever efficiencies ILECs have. For instance, Allegiance claims section 251(c)(6) gives “full parity in terms of access to, and use of, ILEC central offices.” Allegiance Comments at i-ii. Conectiv similarly argues that the Commission must ensure “competitive parity between collocating CLECs and their ILEC hosts.” Conectiv Comments at 16. CoreComm and its joint commenters argue that the Commission “should adopt rules governing collocation that create competitive parity between retail local exchange service offered by incumbent LECs and their CLEC wholesale customers.” CoreComm Comments at 3-4. DSLnet claims that the Commission can require “absolute competitive parity between ILECs and CLECs with respect to occupation and use of ILEC central offices and remote terminals.” DSLnet Comments at 24. The Joint Commenters claim that CLECs must be able to collocate the same advanced pieces of equipment

that the ILEC itself is able to use. Joint Comments at 32; *see also* Supra Telecom Comments at 10. WorldCom argues that “necessary” must be read to “enable[] competition.” WorldCom Comments at 6. At the core of WorldCom’s test is a comparison of cost savings and whether the equipment used by the ILEC to serve its own customers contain the same efficiencies and functionalities. *Id.*

The D.C. Circuit’s decision resoundingly rejects the argument that the collocation provision is an equal access provision, *GTE Serv. Corp.*, 205 F.3d at 423-24, a sentiment also expressed at oral argument. When FCC counsel argued that carriers should be allowed to collocate multi-functional equipment because incumbents do, the court responded that it is “a really extraordinary notion if the incumbent . . . is efficient, has found some good ways to run its operation on its own premises, and the competitor can figure out what they are, the competitor ought to be able to do the same thing on the incumbent’s premises too.” *GTE Tr.* at 32. The court stated that “that can’t be what the statute means.” *Id.* Thus, although CTSI claims that “CLECs are entitled to collocate in the same manner as ILECs,” CTSI Comments at 4, ILECs are not *collocating*. They are placing their own property on their own premises. CLECs are allowed to intrude on the ILECs’ property only to the limited extent that intrusion is *necessary* for interconnection to the LEC network or access to UNEs.

Commenters’ attempts to ground their claims on other efficiency arguments are similarly unavailing. For instance, AT&T suggests that the Commission should allow collocation if, “absent collocation, new entrants’ costs of providing service would increase to the point that CLECs would be precluded from providing at least some telecommunications services through interconnection or access to UNEs in at least some areas, or that the CLEC would be precluded from offering service through interconnection or access to UNEs at the same quality as the

incumbent.” AT&T Comments at 16. This strips the “necessary” standard of all meaning. Pursuant to this argument, as long as one new entrant – no matter how inefficient or poorly run – would face higher costs in *any* area such that it would not provide *some* telecommunications service, collocation would be permitted. Other commenters make similarly limitless pleas based on efficiency and the 1996 Act’s goal of promoting advanced technology. *See, e.g.*, ATG Comments at 3; @Link Comments at 21-22; CompTel Comments at 4-5, 9; CTSI Comments at 3. These commenters claim that, without an expansive collocation regime, some CLECs will have less efficient alternatives and others “will be unable to break into the market and reach consumers.” CTSI Comments at 3.

The 1996 Act is designed to promote competition, not to prop up individual competitors. *See Competitive Telecomms. Ass’n v. FCC*, 87 F.3d 522, 530 (D.C. Cir. 1996) (inefficient firms should fail in a competitive market; these firms should not be protected because the goal is to “promote competition . . . not to protect competitors”). Section 251(c)(6) is especially circumscribed in scope because it authorizes a physical taking of an incumbent’s property. It is neither a limitless grant of authority to the Commission nor a broad subsidy to individual competitors, as commenters like AT&T claim. Indeed, such a reading is contradicted by both the plain meaning of “necessary” – which the D.C. Circuit affirmed means “required” or “indispensable” – and the overall purpose of the 1996 Act.

CompTel, recognizing that “efficiency considerations in a vacuum cannot justify a taking,” proposes a “material[]” efficiency test. CompTel Comments at 4. But CompTel’s test is simply whether a CLEC requests collocation. That is, under CompTel’s reading, a piece of equipment must be necessary for interconnection or access to UNEs or else a competitor would not have sought to collocate it. *Id.* at 5-6. The Commission relied on this same logic in the

*Local Competition Order*³ to support its interpretation of “necessary” in section 251(d)(2). The Commission argued that “no rational entrant would seek access to network elements from an incumbent if it could get better service or prices elsewhere.” *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 389 (1999). The Supreme Court rejected this argument, holding that “that judgment allows entrants, rather than the Commission, to determine . . . whether the failure to obtain access to nonproprietary elements would impair the ability to provide services.” *Id.*

In short, despite the 1996 Act’s plain language and purpose, and the D.C. Circuit’s equally plain pronouncement that section 251(c)(6) contains a clear limit on the taking of an incumbent’s property, AT&T, CompTel, and other commenters nevertheless ask the Commission to read this provision to allow the collocation of virtually anything and everything. Indeed, the only equipment that would be excluded under CompTel’s and AT&T’s view is the patently nonsensical (*e.g.*, equipment that is not telecommunications equipment, such as equipment used to process payroll). *See* AT&T Comments at 13, 17; CompTel Comments at 8 (relying on the fact that payroll and data collection functionalities could not be collocated to claim its standard provides a “limit[]”). CompTel seems to believe that it is a real limit that its test “does not justify the collocation of any and all equipment which conceivably might be utilized by an individual CLEC.” CompTel Comments at 8. It is difficult to imagine a broader breach of the D.C. Circuit’s mandate than such a standard.

Under the reading proposed by AT&T, @Link, Allegiance, CompTel, Conectiv, and others, “necessary” adds nothing to the remaining terms of the statute. The limits claimed by the

³ First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15795, ¶ 581 (“*Local Competition Order*”), *modified on recon.*, 11 FCC Rcd 13042 (1996), *vacated in part*, *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *rev’d in part, aff’d in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), *decision on remand*, *Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8th Cir.),

commenters come not from the word “necessary” but from the phrase “for interconnection or access to unbundled network elements.” That is, if “necessary” were removed from the statute, what would be left is the phrase “equipment for interconnection or access to unbundled network elements.” Thus, under the proposed definitions, “necessary” provides no function not already provided for by the phrase “for interconnection or access to UNEs.” But despite AT&T’s and other commenters attempts to make the term “necessary” in section 251(c)(6) “academic.” AT&T Comments at 12, Congress did not place a meaningless term in section 251(c)(6). *See Iowa Utils Bd.*, 525 U.S. at 388-39 (rejecting interpretation of necessary and impair standard that rendered it mere surplus); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) (statutes must be read “to give effect, if possible, to every word Congress used”).

Commenters’ attempts to rely on the “terms and conditions that are just, reasonable, and nondiscriminatory” language of section 251(c)(6) fare no better. AT&T argues that this language “prohibits incumbents from precluding the collocation of multi-purpose telecommunications equipment” and cross-connects. AT&T Comments at 17, 33. Allegiance claims that “[i]t would be hard to overstate the breadth of the Commission’s authority” under this provision and that this is a “well-spring of authority enabling the Commission to impose far reaching nondiscrimination obligations in terms of provision of physical collocation.” Allegiance Comments at 42; *see also* Conectiv Comments at 3 (“it would be difficult to overstate the scope of the Commission’s authority”).

But these commenters have the analysis backward. The threshold inquiry is first whether the “necessary” standard is satisfied. Only after the Commission determines that equipment can be lawfully placed on an incumbent’s property do the terms of the collocation come into play. If

petitions for cert. filed, Nos. 00-511, 00-555, 00-587, 00-590 & 00-602 (U.S. 2000).

there were any room for doubt on this score based on the plain terms of the 1996 Act – and there is not – the D.C. Circuit’s decision settles the matter. AT&T made this same argument in an attempt to defend the Commission’s prior interpretation. *See* Joint Brief of Intervenors in Support of Respondents at 13-14, Nos. 99-1176 & 99-1201 (D.C. Cir. filed Nov. 29, 1999) (“Intervenors Br.”). The D.C. Circuit rejected AT&T’s argument, concluding that it had no basis in the statute – including the “terms and conditions” language relied upon by AT&T in its intervenors brief. *GTE Serv. Corp.*, 205 F.3d at 423.

Finally, the fact that equipment that is not necessary for access to UNEs or interconnection takes up the same or less space than equipment that is necessary for access to UNEs or interconnection does not make it any less of an unauthorized taking. *See, e.g.*, AT&T Comments at 18; Cisco Comments at 7; CompTel Comments at 9-10; CTSI Comments at 14; Supra Telecom Comments at 14-15. The equipment still “effectively destroys” the incumbent’s right to possess, use, and dispose of the property as it sees fit. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 420 (1982). “[T]he owner has no right to possess the occupied space himself, . . . [or] to exclude the occupier.” *Id.* at 435. Indeed, at oral argument in *GTE Service Corp.*, the judges made clear that they were concerned with the Commission’s decision to allow multi-functional equipment, even based on the assumption that the equipment would not require more space. *See* GTE Tr. at 16-17 (petitioners’ counsel conceded, for the purposes of the argument, that there is no significant increase in the amount of space occupied by equipment that is multi-functional); *id.* at 18 (the court noted that “the real imposition on your property rights is not on your physical property, not your volumetric loss, but on the intrusion

into your otherwise valid right to exclude a competitor from your premises”); *id.* at 23 (“assuming . . . that [multi-functional equipment] may not require more space”).⁴

The Commission is legally bound, therefore, to apply the limiting standard Congress enacted and the D.C. Circuit described. It is authorized to allow collocation of only that equipment that is necessary – *i.e.*, indispensable – for access to UNEs and interconnection with the incumbent’s network.

II. The Commission Lacks Authority To Authorize Collocation of the Equipment Requested by Commenters

Given the sweeping, illegitimate definitions of “necessary” proposed by commenters, it is perhaps unsurprising that they seek permission to collocate virtually anything and everything on an incumbent’s property. These commenters want to collocate equipment that bears little resemblance to the types of equipment Congress envisioned when it passed section 251(c)(6). Indeed, instead of having the Commission *limit* the equipment that can be collocated, in accordance with the court’s mandate, these commenters actually ask the Commission to use this remand as an opportunity to *expand* the list of equipment to include equipment, such as stand-alone switching equipment, that this Commission has always held fails to meet section 251(c)(6)’s standards. Neither the 1996 Act nor the D.C. Circuit’s decision will support these requests. None of these commenters demonstrate that the equipment they seek to collocate is required or indispensable for access to UNEs or interconnection. Rather, these commenters merely show, at most, that the equipment satisfies their limitless, unlawful tests for what is “necessary.”

⁴ In any event, much of the equipment they seek to collocate, such as stand-alone switching, typically does require more space. *See Alcatel Comments* at 15.

For instance, several commenters ask the Commission to authorize the collocation of equipment not because it is necessary for access to UNEs or for interconnection, but because it is helpful or efficient for CLECs. These commenters would have the Commission re-impose the collocation of multi-functional equipment on the very same foundation the D.C. Circuit rejected in *GTE Service Corp.* For instance, Gluon indicates that there should be no limitation placed on equipment functionality. Gluon Comments at 4. Tachion asserts that this Commission should not limit the use of *any* installed functionality, regardless of whether it bears a relationship to access to UNEs or interconnection. Tachion Comments at 2-6. AT&T claims packet switches should be collocated because they perform more than mere switching functions and allow “a dramatic increase in . . . efficiency.” AT&T Comments at 29-30. ATG asks for the collocation of concentration devices to “more efficiently utilize bandwidth.” ATG’s Seefloth Decl. ¶ 7. Allegiance interprets section 251(c)(6) as permitting collocation of a wide range of telecommunications equipment that performs many functions in excess of enabling interconnection and access to UNEs. Allegiance Comments at 61-65. CoreComm asserts that as long as one feature enables interconnection, additional telecommunications features of a piece of equipment may also be used. CoreComm Comments at 27. Covad makes the same claim. Covad Comments at 16. But the D.C. Circuit made quite clear that efficiency concerns do not trump the 1996 Act’s plain meaning.

Some commenters would go even further and have the Commission permit the collocation of switching equipment. *See, e.g.,* Allegiance Comments at 61-65; Supra Telecom Comments at 12; AT&T Comments at 24-32; CoreComm Comments at 21-23; Covad Comments at 22-25; DSLnet Comments at 28; Network Access Solutions Comments at 13; NorthPoint

Comments at 6-8.⁵ Switching, however, is not necessary in any sense for access to UNEs or interconnection. The Commission itself has reached this conclusion. The Commission determined in the *Local Competition Order* and again in the *Advanced Services Collocation Order* that collocation of switching equipment fails to meet even the Commission's overly broad definition of "necessary" that the Supreme Court rejected, much less the stringent definition Congress enacted. *See Local Competition Order*, 11 FCC Rcd at 15795, ¶ 581 (refusing to "impose a general requirement that switching equipment be collocated *since it does not appear that it is used for the actual interconnection or access to unbundled network elements*") (emphasis added).⁶

Unsurprisingly, these commenters do not attempt to show that the switching and multi-functional equipment they seek to collocate is "necessary" as that term was defined by the D.C. Circuit.⁷ They do not demonstrate that the equipment is in any sense required or indispensable

⁵ Moreover, even if these commenters could get past the critical threshold inquiry, and they cannot, they have neglected the alternative of placing host switches in a so-called carrier hotel. Carrier hotels are privately-owned buildings which are constructed for the purpose of housing telecommunications equipment. *Supra* Telecom would rather collocate their host switches at the ILEC's central offices because the "rental rates" for collocation are substantially less than the rental rates for retail floor space. But the D.C. Circuit and the Supreme Court have made clear that such cost differences do not override the clear limitations Congress enacted in the 1996 Act.

⁶ SBC voluntarily allows the collocation of Remote Switching Modules ("RSMs") with the following restrictions: (1) the RSM may not be used as a stand-alone switch; the RSM must report back to and be controlled by a CLEC identified and controlled (*i.e.*, CLEC-owned or -leased) host switch, and direct trunking to the RSM will not be permitted; and (2) the RSM must be used only for the purpose of interconnection with the SWBT network for the transmission and routing of telephone exchange service or exchange access or for access to the SWBT's UNEs for the provision of a telecommunications service.

⁷ Commenters' reliance on the Merger Conditions adopted in the SBC/Ameritech and Bell Atlantic/GTE proceedings to show that this equipment is "necessary" is misplaced. *See* AT&T Comments at 31-32; CoreComm Comments at 25-27. Those conditions were voluntary commitments made by parties seeking to obtain merger approval. The Commission expressly disavowed in both proceedings that the conditions "constitute any determination or standard regarding . . . compliance or non-compliance with 47 U.S.C. §§ 251, 252, 271, or 272."

for access to UNEs or for interconnection.⁸ Instead, they make only a naked plea in the name of efficiency. They argue that, without such a right, their costs would rise. *See, e.g.*, AT&T Comments at 25; ATG Comments at 3; Network Access Solutions Comments at 14; Supra Telecom Comments at 12. They also contend that limiting equipment functionality would freeze the development of telecommunications technology. Allegiance Comments at 1-5; AT&T Comments at 26.⁹ But the D.C. Circuit rejected precisely these efficiency arguments in *GTE Service Corp.* *See* 205 F.3d at 423-24.

In fact, the Commission and the intervenors supporting the Commission advanced precisely such efficiency arguments in their attempt to defend the prior multi-functional equipment collocation regime – and the D.C. Circuit flatly rejected them. The Commission told the court that it based its determination to allow the collocation of multi-functional equipment on evidence in the record that ““requiring competitive LECs to purchase single-function equipment would relegate competitors to less efficient equipment and create unnecessary roadblocks to competitive entry.”” FCC Br. at 40-41 (quoting *Advanced Services Collocation Order*, 14 FCC

Memorandum Opinion and Order, *Applications of Ameritech Corp., Transferor and SBC Communications inc., Transferee For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules*, 14 FCC Rcd 14712, 14968 (1999); Memorandum Opinion and Order, *Application of GTE Corp., Transferor, and Bell Atlantic Corp., Transferee For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, CC Docket No. 98-184, FCC 00-221, App. D (rel. June 16, 2000).

⁸ Network Access Solutions argues that Qwest’s voluntary offer to allow the collocation of ATM equipment reflects Qwest’s recognition that this equipment is “necessary.” Network Access Solutions Comments at 13. But Qwest’s offer is a voluntary offer that has no bearing on the interpretation of the mandatory requirements of section 251(c)(6). One carrier’s voluntary offer cannot override other carriers’ property rights.

⁹ As noted above, the fact that this unnecessary equipment occupies no more collocated space than equipment that is necessary, *see, e.g.*, AT&T Comments at 27, is irrelevant under the plain language of section 251(c)(6).

Red at 4779, ¶ 31). Counsel for the FCC stated at oral argument that the Commission imposed the multi-functional equipment requirement because denying competitors the ability to collocate that equipment “would deny new entrants the right to use the most efficient equipment and place them at a competitive disadvantage.” GTE Tr. at 23. The D.C. Circuit rejected as inconsistent with the 1996 Act the Commission’s argument that “necessary can be equated to used or useful because that’s the meaning that gives the effect to the broad purpose of the competitive equality” in the 1996 Act. *Id.* at 27. The court held that the Commission’s efficiency argument “diverges from any realistic meaning of the statute.” *GTE Serv. Corp.*, 205 F.3d at 424 (citation omitted). The statute only requires collocation of equipment that is “necessary” and “nothing more.” *Id.* at 423. The court repeated the Supreme Court’s admonishment that the Commission is not free to “blind itself to statutory terms in the name of efficiency.” *Id.* at 424. The court held that requiring collocation of multi-functional equipment “impermissibly invites unwarranted intrusion upon LECs’ property rights” and is “overly broad and disconnected from the statutory purpose enunciated in § 251(c)(6).” *Id.* at 422. The Commission cannot now disregard the D.C. Circuit’s conclusion and simply re-establish its prior regime – or, indeed, expand it – as these commenters request.¹⁰

For the same reason, commenters fail to support their requests for collocation of line cards under the language of section 251(c)(6). *See, e.g.*, GSA Comments at 7; Joint Comments at 81; Sprint Comments at 9; WorldCom Comments at 10. The placement of an ADSL Line Unit (“ADLU”) card into digital loop carrier (“DLC”) equipment neither provides a CLEC with

¹⁰ Even if the Commission were free to consider efficiency in determining what equipment can be collocated – which it cannot – commenters’ claims that telecommunications technology development is driven by collocation are counterfactual. Indeed, if these commenters were correct, the telecommunications industry would still be using cross-bar switches instead of digital switches because CLECs have been prohibited from collocating stand-alone switching.

access to UNEs nor does it provide for interconnection between the ILEC's network and the CLEC's network for the mutual exchange of traffic. *See also* BellSouth Comments at 6. CoreComm argues that CLEC ownership of the card is necessary for access to subloops. CoreComm Comments at 46-47. In the *UNE Remand Order*, however, the Commission made clear that access to subloops is available only at accessible cross-connect points. Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, 3789, ¶ 206 (1999) ("*UNE Remand Order*"). Unbundled subloops are accessible at the RT only if the CLEC's collocated equipment is cabled to the nearest cross-connect point to those subloops (*e.g.*, the SAI cabinet), or to the "engineered controlled splice." *See* Second Memorandum Opinion and Order, *Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer Control*, CC Docket No. 98-141, FCC 00-336, App. A ¶ 5 (rel. Sept. 8, 2000) ("*Pronto Modification Order*"). The NGDLC shelf is not such an accessible cross-connect point. The plug-in/cards in the NGDLC equipment require the shelf, which is "hard wired" to the copper feeder cables and its supporting environment (*i.e.*, power, software, and backplane connections), to work.¹¹

Nor are line cards necessary for access to any other UNE. A CLEC-owned line card by itself does not provide access to the high frequency portion of the loop. As Alcatel states, "[w]hat can be used for interconnection or access are the derived service and facility interfaces

¹¹ CoreComm is also mistaken when it suggests that SBC/Ameritech agreed to allow CLECs the right to install plug-in cards in the NGDLC system. CoreComm Comments at 26. SBC has not agreed to install plug-in/cards in SBC-owned NGDLC. Indeed, SBC has contended that CLEC ownership of the cards is the least efficient and least effective way to bring advance services to the consumer market. Moreover, as Alcatel explains, it is simply not feasible for CLECs to install their own cards.

supported by each system, its software and its line cards, all operating together.” Alcatel Comments at 16. The line card itself therefore fails to satisfy the statutory test for collocation.

Moreover, because the line card is a subcomponent of the NGDLC RT and because it has neither a stand-alone function nor any physical termination capability, it does not constitute “equipment” as that term has been used by the Commission in the collocation context. The Commission’s requirements for collocation always have involved complete units of equipment, not piece-parts or subcomponents that go inside of ILECs’ equipment. *See* 47 C.F.R. § 51.323(b) (*vacated in part by GTE Service Corp.*, 205 F.3d 416).¹² Thus, just as there is no obligation to allow CLECs to alter the software of an unbundled central office switch,¹³ there can be no obligation to allow CLECs to reconfigure shared Digital Loop Electronics-Digital Subscriber Line (“DLE-DSL”) equipment in RTs by inserting their own line cards. *See* Verizon Comments at 8-9.

A line card cannot provide service without its support system (software, power, backplane, etc.), so merely collocating a line card gives no guarantee that the card will provide the expected service. A line card is merely “one component of an NGDLC system” that works “in conjunction with other plug-in cards and software.” *Pronto Modification Order* ¶ 4 n.11. Thus, although commenters claim that collocating their own line cards would allow them to offer different “flavors” of DSL, there are substantial technical impediments to allowing the mixing of

¹² Similarly, in the recent *Pronto Modification Order*, the Commission found that ADLU cards in RTs are advanced services equipment, but continued to discuss collocation in the context of complete units of equipment, *e.g.*, NGDLCs. *Pronto Modification Order* ¶ 14.

¹³ *See Local Competition Order*, 11 FCC Rcd at 15708, ¶ 415 (incumbent LEC retains control over operations of the switch); Memorandum Opinion and Order, *Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Louisiana*, 13 FCC Rcd 20599, 20727, ¶¶ 217-218 & n.698 (1998) (Bell operating company (“BOC”) must provide access to vertical features “loaded in the software of the switch”).

suppliers' cards in a NGDLC. The leading equipment manufacturers attest to this. Nortel notes that it would not be practical to mandate collocation of line cards because "[t]he DLC market has evolved without industry standards having been developed to allow interchangeability of line cards." Nortel Comments at 4. Nor are such standards being developed. *Id.* Without these standards, "it would be virtually impossible to use different manufacturers' line cards in a single DLC." *Id.* As Alcatel explains, line cards are controlled by system software; the placement of a non-authorized line card in the system does not guarantee it will work, and could cause the entire system to fail. Alcatel Comments at 16; *see also* Verizon Comments at 9 (quoting various equipment manufacturers that attested to the fact that collocating line cards is not a viable concept); BellSouth Comments at 19 (noting that the placement of an incorrect line card into BellSouth's DLCs could render the entire system inoperative).

In addition, collocation of line cards could prematurely exhaust the capacity of the NGDCL.¹⁴ Each NGDLC is engineered and installed with enough slot capacity to serve customers in a specific geographic area. In most NGDLCs, each plug-in/card has multiple ports (*i.e.*, multiple customers per plug-in/card). Each slot is wired directly to the copper feeder cable to accommodate the number of customers expected to be assigned to that plug-in/card and slot. When a carrier other than the ILEC owns a plug-in/card, a certain number of cable pairs become unavailable for use by the incumbent LEC or any other CLEC. For example, in the case of the Alcatel Litespan, each plug-in/card has two ports capable of providing both POTS and DSL service to two different customers and will evolve to four ports or four customers per plug-

¹⁴ *See* Reply Comments of SBC Communications Inc. in Support of a Determination That SBC Incumbent LECs May Own Combination Plugs/Cards and Optical Concentration Devices at 15-16, *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Ameritech Corporation, Transferor, to SBC Communications Inc., Transferee*, CC Docket No. 98-141 (FCC filed Mar. 10, 2000).

in/card for POTS and DSL by mid-2001. If a CLEC is allowed to own the plug-in/card and serve one customer, three cable pairs would become unavailable for the incumbent LEC or other CLECs to serve other customers. In other words, 75 percent of the card's capacity would become unavailable to other CLECs and the incumbent to serve DSL end users. If multiple CLECs were allowed to own and place their plug-in/card in the NGDLC, the equipment would exhaust much sooner than if the ILEC owned the plug-in/card and the ports were shared among the various CLECs. *See Verizon Comments at 10* (noting that it is to be expected that many carriers will not use all the circuits). Thus, if a CLEC were allowed to collocate line cards, it would strand the remaining capacity of the card and greatly diminish the efficiency and capacity of the NGDLC.

Even if the legal and technical obstacles were surmountable – and they are not – allowing collocation of a line card would also increase costs (which would have to be passed on to consumers) and add delays (also at the expense of consumers). As Verizon explains, ordering and provisioning of DSL and POTS services would become complicated with a CLEC-owned plug-in/card. A procedure would have to be developed to verify whether a slot is available to serve the specific geographic area where the customer is located and whether capacity is available in the NGDLC. The need to verify slots and port availability and the ownership of the specific card, plus the additional handling that would be necessary, will result in longer provisioning intervals for the CLEC requesting service activation. Indeed, manual handling of service orders would be required unless and until automated systems could be developed (at significant cost) to prevent assignment of CLEC-A's customer to CLEC-B's plug-in/card. All of this manual handling will add additional time and cost to all carriers desiring to provide services over the NGDLC networks.

Service quality issues are also presented by the collocation of line cards. CLECs would have to provide the incumbent with spare line cards to replace promptly defective cards. Tracking these maintenance spares would place a severe burden on the ILEC, particularly when multiple CLECs own multiple types of line cards. The incumbent's technicians would be required to identify the owner of the defective line card, determine whether the owner has a spare, and locate that spare. This could significantly increase the repair interval for the end user's POTS and/or data service, which means longer service outages, customer dissatisfaction, and complaints.

Finally, the Commission should reject Metromedia's request that it be allowed to collocate Fiber Distribution Frames ("FDFs") in the ILEC's cable vault to provide transport services to CLECs. Metromedia Comments at i-ii. As an initial matter, FDFs do not qualify as "equipment" under the 1996 Act. FDFs are passive devices without any electronics that allow two fiber strands to be cross-connected. As Metromedia states in its comments, "[a]n FDF is the technical equivalent of a splice between the two networks." *Id.* at 14. But a splice or cross-connect point is not "equipment" for purposes of collocation, just as line cards are not. Moreover, even if FDFs were deemed equipment for purposes of section 251(c)(6), they are not necessary for access to UNEs or for interconnection. Metromedia requests that they be allowed to place FDFs on the ILEC's premises for the purpose of providing interoffice transport fiber to CLECs. Such an arrangement does not provide interconnection with the incumbent or access to UNEs. Indeed, Metromedia's interoffice transport fiber is wholly *independent* of the ILEC's network. For these reasons, Metromedia's request that FDFs be considered "necessary" equipment should be denied. *See also* PF.Net Comments at 3-4.¹⁵

¹⁵ Metromedia has also requested that the Commission require ILECs to provide a "stable